

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3 ABDULRAHMAN ALHARBI,)

4 Plaintiff)

5 -VS-)

CA No. 14-11550-PBS

) Pages 1 - 17

6 THE BLAZE, INC., et al,)

7 Defendants)

8
9 **HEARING**

10 BEFORE THE HONORABLE PATTI B. SARIS
11 UNITED STATES CHIEF DISTRICT JUDGE

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15 United States District Court
16 1 Courthouse Way, Courtroom 19
17 Boston, Massachusetts 02210
18 October 17, 2016, 3:32 p.m.

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23 LEE A. MARZILLI
24 OFFICIAL COURT REPORTER
25 United States District Court
 1 Courthouse Way, Room 7200
 Boston, MA 02210
 (617)345-6787

A P P E A R A N C E S:

PETER J. HALEY, ESQ., Nelson Mullins Rile & Scarborough,
LLP, One Post Office Square, 30th Floor, Boston, Massachusetts,
02109, for the Plaintiff.

MICHAEL J. GRYGIEL, ESQ. and ZACHARY C. KLEINSASSER, ESQ.,
Greenberg Traurig, LLP, One International Place,
20th Floor, Boston, Massachusetts, 02110, for Premiere Radio
Networks, Inc.

P R O C E E D I N G S

THE CLERK: United States District Court calls Civil Action 14-11550, Alharbi v. The Blaze. Could counsel please identify themselves.

MR. HALEY: Good afternoon, your Honor. My name is Peter Haley. I represent the plaintiff, Abdul Alharbi.

MR. GRYGIEL: Good afternoon, your Honor. Mike Grygiel, Greenberg Traurig, and with me is Zach Kleinsasser from our office as well. We represent the defendant, Premiere Networks.

THE COURT: Thank you. This is very late-arising, so I don't know that I'm going to rule today. And, as I understand it, it's a fait accompli, is that correct? You sent the money over to the IRS already?

MR. GRYGIEL: We did, your Honor, as required under federal tax law.

THE COURT: Did you all talk about this during the settlement discussions? Did you tell them what the issue was?

MR. HALEY: So, your Honor, in the course of the settlement discussions, the parties drafted a settlement agreement. In that agreement, it said that the defendants would pay to Mr. Alharbi (\$ sealed) upon receipt of tax verification with his tax identification number on it acceptable to Premiere. The plaintiff was concerned that the phrase "acceptable to Premiere" would lead to some uncertainty,

1 and accordingly the plaintiff marshalled his own W-8 form
2 providing his tax information, and, as requested, since the
3 money was being wired to my firm, my firm's W-9 account.

4 So then, in the settlement agreement, it says clearly
5 not that they'll pay when they get the tax information but they
6 acknowledge that they had received the tax information that
7 they requested. It then says that the settlement amount will
8 be paid to a specific account by wire instruction. The
9 agreement is clear. There isn't any ambiguity about it.

10 THE COURT: Yes, but I don't know what to do because
11 it went to the IRS. I don't know why you did this when there
12 was a dispute over it. I'm in a terrible spot right now. It's
13 not like they're keeping it. They've sent it to the IRS.

14 MR. HALEY: Well, they sent it to the IRS for the same
15 reason that they allege that Mr. Alharbi had anything to do
16 with the Marathon: because they could, because they thought
17 they could get away with it, and because even a dog knows --

18 THE COURT: Excuse me. But it's not like they've kept
19 it. That would be a different story. I'm not sure if that
20 statute covers this. I don't know. I'm not prepared to rule
21 on it right now. I'm not prepared to reopen this case. I'm
22 not prepared to give them a contempt order. I don't know.

23 Why didn't you say you were going to do this?

24 MR. GRYGIEL: Your Honor, we did. I mean, I notified
25 Mr. Haley five days ahead of time prior to making the payment,

1 which had to come in on the 27th, advising him that the payment
2 was subject to U.S. income tax, which it is, and that's not in
3 dispute on the motion, and giving him the chance to make a
4 different arrangement. It wasn't made.

5 THE COURT: But when it wasn't agreed upon, why didn't
6 you come to me? This is a mess, mess. I don't know the answer
7 to this. I got your -- I've been in court literally since 9:00
8 o'clock. I got your stuff. It was too late for me to do
9 anything. I'm not going to make them pay over and above. I
10 mean, let me ask you this: Do you owe the 30 percent, not you
11 but Mr. Alharbi?

12 MR. HALEY: I do not know, your Honor. Mr. Alharbi,
13 there's no -- Mr. Alharbi is a citizen of Saudi Arabia. He's
14 not a tax resident of the United States. I don't have a
15 position as to the tax status, but I don't believe that there's
16 anything that prevented the defendants from complying with the
17 obligations that they entered into.

18 THE COURT: Well, I don't know, and I'm not going to
19 make -- it's unjust enrichment to ask them to pay another
20 (\$ sealed).

21 MR. GRYGIEL: Your Honor, the law is clear. We've
22 consulted with the tax people in our law firm. We've looked at
23 this very carefully. Premiere has an obligation to withhold
24 30 percent.

25 THE COURT: Well, I read the statute. It doesn't say

1 settlement amounts. I read the statute. I don't know if the
2 word "income." And I don't know how that applies to libel, and
3 I don't know how that applies to emotional distress versus
4 reputational damage. I don't know. I just wish I wasn't
5 catching it in this status. And I'm not prepared to reopen the
6 case. He probably does owe the money, right?

7 MR. HALEY: I don't agree with that, your Honor.

8 THE COURT: Well, why doesn't he?

9 MR. GRYGIEL: There's no question that he does, your
10 Honor.

11 THE COURT: I don't know. Excuse me. There is a
12 question. This is a settlement of a libel claim.

13 MR. GRYGIEL: Correct.

14 THE COURT: There is a question. I'm not an expert on
15 this. I don't have the whole division of Greenberg Traurig to
16 sit and look up the tax. Typically this happens in an
17 employment case.

18 MR. GRYGIEL: Correct, your Honor.

19 THE COURT: I don't know.

20 MR. GRYGIEL: Since 1996, the Internal Revenue Code
21 was amended to make payments for alleged reputational injury in
22 defamation cases taxable income under the Code. That wasn't
23 the case before 1996. That's when the Tax Code was amended.

24 THE COURT: Maybe. I'm just not prepared to rule on
25 it off the bench, and I'm just annoyed, as you can tell, that

1 someone didn't come to me beforehand -- "annoyed," put it in
2 quotes -- that someone didn't come to me before all this
3 happened because now I'm not going to order them to pay another
4 (\$ sealed). I'm just not going to do it. So now it's a
5 question of, should we ask the -- how do you get it back from
6 the IRS? Maybe what happens is, if they're wrong, they have to
7 pay the attorneys' fees.

8 MR. HALEY: The plaintiff didn't make any remittance
9 to the IRS. The defendants were the ones who remitted the
10 funds to the IRS, and I --

11 THE COURT: I'm just saying, it may be that you're
12 going to have to file a petition to get it back. And I will
13 order, if there was a breach of this agreement, as compensatory
14 damages your attorneys' fees for getting it back. I mean, why
15 isn't that the solution here? But I just don't think it was --
16 let me just throw this out here -- wise, pragmatic lawyering to
17 have such a major issue outstanding without coming to me before
18 it was a fait accompli. It was like, I hate to say, pulling a
19 quick one. And you may be right at the end of the rainbow.
20 It's just you could have deposited it in escrow here, and then
21 I could have figured it out.

22 MR. GRYGIEL: Your Honor, we weren't trying to pull a
23 quick one. We were complying with our withholding obligations
24 under the law.

25 THE COURT: Excuse me. It was disputed, and you've

1 taken the decision away from me as to whether or not it applied
2 or not, and you certainly took it away from them as to whether
3 or not there were exceptions to this rule. He's not a tax
4 lawyer. You're representing from the Boston Bar, right?

5 MR. HALEY: I'm part of the pro bono program from the
6 Boston Bar, correct.

7 THE COURT: Yes, I mean, do you get any money out of
8 this?

9 MR. HALEY: No, your Honor.

10 THE COURT: He's doing it pro bono.

11 MR. GRYGIEL: I understand that, your Honor, but
12 plaintiff's counsel's law firm, like Greenberg Traurig, is also
13 a very large law firm, and there are resources available to
14 look at this question.

15 THE COURT: Have you asked tax counsel to look at it?

16 MR. HALEY: I was not aware until this morning that
17 they had remitted the withholding amount, your Honor. We
18 looked at the issue of the disbursement from our firm, since
19 that's where the money was being wired to, and we're satisfied
20 that we were able to make a disbursement to the plaintiff
21 without withholding.

22 THE COURT: You had an analysis that this provision
23 didn't apply?

24 MR. HALEY: I provided the information to general
25 counsel at my firm and the appropriate tax counsel. They

1 advised me that upon receipt of the settlement amount, they
2 would be able to remit the settlement amount to the plaintiff
3 without deduction.

4 THE COURT: Well, what did they say about -- well,
5 that's attorney-client, but I would need some -- let me put it
6 this way: I'm not reopening the case. I will, if the IRS ends
7 up deciding that this is improperly done, I will take as a
8 related case a request for breach of contract and the
9 attorneys' fees and perhaps punitive damages for doing this;
10 but unless you can show me that, I don't know what I can do
11 here. When is he going home?

12 MR. HALEY: Shortly, your Honor, some time in the next
13 30 days, but, you know, I imagine we could pursue the matter
14 whether or not he was present within the United States or not.

15 THE COURT: Excuse me. Whether or not he was here or
16 not, you could pursue the matter for him?

17 MR. HALEY: Correct, your Honor.

18 THE COURT: Okay, so make sure you keep billing
19 sheets.

20 MR. HALEY: Yes, your Honor. That's unfortunately a
21 daily requirement of my life, whether or not I'm getting paid.

22 THE COURT: I very much appreciate your doing it
23 pro bono. I'm really unhappy about how this played out because
24 that's why I'm here, if you knew it was disputed, if you knew
25 there was an issue, if it wasn't part of the settlement

1 agreement, which it apparently was not. It may be statutory
2 mandate. I may have come out on your side. I just feel as
3 if -- as I said, it feels like a sleight of hand. I don't
4 understand why it wasn't negotiated and put in the settlement
5 agreement as to what was supposed to happen.

6 MR. HALEY: Right.

7 THE COURT: Did you just find out about it last week?

8 MR. GRYGIEL: Myself, your Honor?

9 THE COURT: Yes.

10 MR. GRYGIEL: No.

11 THE COURT: So why didn't you say to him, "This is
12 what we need to do"?

13 MR. GRYGIEL: Your Honor, I did advise plaintiff --

14 THE COURT: Why wasn't it in the agreement?

15 MR. GRYGIEL: Well, again, your Honor, with all due
16 respect, I don't think it's my provision to advise the
17 plaintiff's counsel about the tax consequences of the
18 settlement to be received by his client.

19 THE COURT: It's called good faith and fair dealing on
20 your part --

21 MR. GRYGIEL: Yes, your Honor.

22 THE COURT: -- that if you feel as if you had to
23 withhold, it needed to be explicitly put into the settlement
24 agreement, or maybe it would be a deal breaker, or maybe you
25 come to me for a ruling or the IRS for a ruling; but to have it

1 come up afterwards is what's so troubling.

2 MR. GRYGIEL: Your Honor, again, if you look at the
3 record, I did notify plaintiff's counsel in two very long,
4 detailed letters.

5 THE COURT: That you were going to withhold?

6 MR. GRYGIEL: That we were going to withhold, that it
7 was taxable income, and I even suggested -- somebody has to pay
8 the tax under U.S. law, either Premiere, and we have an
9 obligation to. We were willing to pay the full amount to
10 plaintiff's counsel if we could get an indemnification, and I
11 made that offer September 22, black and white in my letter.

12 THE COURT: So why wasn't it part of the written
13 settlement agreement? That's the kind of material term that
14 you'd think would be.

15 MR. HALEY: The settlement agreement had a tax
16 reference in there. It acknowledged they had received the tax
17 information, and it had a specific provision for the payment of
18 the settlement amount in a specific amount. And although
19 counsel is correct that he asked my firm on its pro bono
20 engagement to undertake an indemnification of his firm, I'm not
21 in a position to deliver that. And, furthermore, he did not
22 advise, "And we'll just go ahead and pay the withholding amount
23 so as to preclude you from ever getting any relief here."

24 MR. GRYGIEL: No, we did advise to that, and the
25 record speaks to that, your Honor. And I can sense clearly the

1 agitation from the Court, and, believe me, I'm sorry we're here
2 too. We had to make the tax withholdings. We don't care who
3 we paid the money to, but the U.S. government under law gets
4 its chunk of the settlement payment.

5 THE COURT: It may be so. It is the kind of thing
6 that savvy lawyers negotiate in advance. It's part of the
7 settlement agreement. It's not something that comes up after
8 the fact, after the payment. But I'm not prepared unless I'm
9 persuaded, which I'm not -- I read the statute -- to say that
10 it's wrong that either you or they had to pay 30 percent. I
11 haven't heard an argument that that's wrong.

12 MR. HALEY: Well, the argument that it's wrong, your
13 Honor, is that they entered into a contract. They agreed to do
14 something specific. They made a provision for tax information
15 as part of the agreement. And as we've cited to in the 2015
16 case from the Northern District of California in the *Pizza v.*
17 *FINRA* matter, the facts and the law are the same. They agreed
18 to do something; they haven't done it. Had they intended to
19 make a withholding, they certainly could have made that
20 provision, as they made the provision to say, "Give us your tax
21 identification number," and they agreed that that had been
22 adequately completed.

23 THE COURT: No, but there's no harm if you had to pay
24 it is the thing. I couldn't agree with you more that I wish it
25 had been a provision in the settlement agreement. I'm not

1 seeing the harm. Where I'm seeing the harm -- and this is why
2 I'm not sealing this, okay -- where I see the harm is if you
3 petition the IRS to get this back and you win, your firm
4 gets -- how much do you bill an hour?

5 MR. HALEY: \$725.

6 THE COURT: -- \$725, or whatever your tax partners
7 charge, times to get it back, plus interest for Mr. Alharbi if
8 you get it back. And I don't know any other way to resolve it
9 right now. I'm sure not trying this case now. And if you get
10 it back, deem it a related case. You file it right now. And,
11 I mean, you know, I don't -- your tax people must know. But,
12 frankly, the problem I had is, when I read the statute and I
13 read what income includes, I had to think he was going to have
14 to pay it. Either you were going to have to deduct it or they
15 were going to have to deduct it. That's what I'm not
16 understanding. You've noticed my frustration and my perfect
17 willingness, if they're wrong, to make all three of them liable
18 for the damages that flow from it.

19 Did you tell him, Mr. Alharbi, that there was probably
20 going to be a 30 percent tax on somebody?

21 MR. HALEY: Your Honor, I'm not going to speak to what
22 I told or didn't tell my client.

23 THE COURT: Fair enough, but is this something that
24 was discussed during the settlement negotiations with him?

25 MR. HALEY: No. The only thing that was discussed

1 was, "What do we need to do on a tax basis? Give us this
2 information in a form acceptable to us." I said, "Here's the
3 information, and I'm not putting in a form acceptable to you.
4 You need to tell me that you have what you need."

5 "We have what we need."

6 "Fine. Here's the amount. Here's the wire
7 instructions," all in the agreement. There isn't any ambiguity
8 in the agreement.

9 THE COURT: There is no ambiguity in the agreement. I
10 do think there may have been a breach of contract, but I'm not
11 convinced that there was any damage flowing from it, that's my
12 problem, because I read the statute, and you've given -- so I
13 don't know -- for me to order another (\$ sealed) would be
14 gross.

15 MR. HALEY: Your Honor, I understand the Court's
16 position, and I'll proceed in the way that the Court suggested.

17 THE COURT: All right, so that's the way we're going
18 to go on this thing.

19 MR. GRYGIEL: Your Honor, just for a moment, may I
20 just address the *FINRA* case because I spoke over the -- when we
21 received the plaintiff's motion, I called the attorney in
22 San Francisco that represented the defendant. And the
23 difference between that case and this case is, here, as I read
24 plaintiff's motion, in all fairness, there is no dispute that
25 the amount of the settlement payment is subject to withholding.

1 That is not disputed. In that case, there was a threshold
2 dispute among the parties over whether the settlement payment
3 was subject to income taxation because here's what happened:
4 There was a termination case. The plaintiff was an executive
5 of FINRA. He brought a lawsuit alleging entitlement to back
6 pay and front pay and a remedy under ERISA. FINRA defended the
7 case saying, "We don't owe you any wages. We don't owe you
8 back pay. You're not entitled to front pay," and they
9 prevailed. The court granted summary judgment, dismissing the
10 plaintiff's back pay and front pay, but said, "You're entitled
11 to a remedy under ERISA of attorneys' fees and that's it,"
12 because apparently the plaintiff was excluded from some
13 internal mentorship program being conducted by FINRA.

14 Lo and behold, the parties go before a magistrate.
15 They negotiate. There was no written agreement in the case.
16 They agreed to a term sheet prepared by the magistrate.
17 There's no discussion of tax withholding, and several months
18 after the fact, when FINRA puts in the money, they say, "This
19 is wages. We're going to withhold." In other words, they took
20 the position in making the settlement payment that was directly
21 antagonistic to that which they asserted in the litigation and
22 on which they prevailed.

23 That's not the story we have here. Here there is no
24 dispute, again, under the federal tax law, that this payment
25 has to be deducted because the plaintiff is a foreign national.

1 THE COURT: I'm not saying it's not distinguishable.
2 I'm simply saying there was a requirement for payment in the
3 agreement. There was no provision for the set-aside payment to
4 Uncle Sam.

5 MR. GRYGIEL: In the cases that we cited --

6 THE COURT: Excuse me.

7 MR. GRYGIEL: Yes, your Honor.

8 THE COURT: And so in a sense there was a breach of
9 contract. There was no provision there. That said, a statute
10 trumps a contract. And so there may have been a breach of
11 contract, but I don't see what damages it caused because the
12 30 percent was going to have to be paid, or, arguably, the
13 contract was void as against public policy. But we could have
14 avoided all of this. Did you just fly up? We could have
15 avoided all of this. If someone had just brought it to my
16 attention, we could have posted it in escrow and worried about
17 it later. So as it is, if you get it back, come back to me.

18 MR. HALEY: Certainly, your Honor.

19 THE COURT: Okay, we stand in recess.

20 MR. GRYGIEL: Thank you, your Honor.

21 THE CLERK: All rise.

22 THE COURT: Can I just say something on the record.
23 This is not a sealed proceeding except for the amount.

24 MR. GRYGIEL: That's fine with Premiere, your Honor.
25 Thank you.

(Adjourned, 3:50 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 17 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action No. 14-11550-PBS,
Abdulrahman Alharbi v. The Blaze, Inc., et al, and thereafter
by me reduced to typewriting and is a true and accurate record
of the proceedings.

Dated this 19th day of October, 2016.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER